In the Supreme Court of the United States.

OCTOBER TERM, 1899.

ROBERT S. LEOVY, PETITIONER,
v.
THE UNITED STATES. } No. 238.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Augustus F. Leovy and Robert S. Leovy were indicted on May 19, 1897, under the act of September 19, 1890 (26 Stats., 454), as amended by the act of July 13, 1892 (27 Stats., 110).

The indictment charged them with having, on November 16, 1895, and on other diverse days during that month, built and caused to be built a dam across a certain navigable river of the United States, known as "Red

Pass," in the parish of Plaquemines, in the State of Louisiana, without first having obtained the consent and permission of the Secretary of War of the United States, and with thus having closed said navigation on said stream, in violation of said law. The defendants pleaded not guilty, and on the trial the jury rendered a verdict against Augustus F. Leovy of not guilty, and found Robert S. Leovy guilty as charged in the indictment, and the court sentenced said Robert S. Leovy to pay a fine of $200 and the costs of the prosecution.

The petitioner here, said Robert S. Leovy, on the trial in the circuit court of the United States for the eastern district of Louisiana reserved three bills of exception to the rulings of the trial judge and presented eleven assignments of error upon a writ of error sued out from said circuit court of the United States for the eastern district of Louisiana to the circuit court of appeals of the United States for the fifth circuit; and said cause coming on to be heard in said circuit court of appeals on Tuesday, February 28, 1899, it was ordered and adjudged by said circuit court of appeals that the judgment of the said circuit court for the eastern district of Louisiana be affirmed. Whereupon said petitioner presented to this court his application for a writ of certiorari to the said circuit court of appeals for the fifth circuit, which said application was allowed by this court on the 6th day of May, 1899, and accordingly the case is before the court upon said writ for a review of the decision of the said circuit court of appeals and the judgment of the circuit court for the eastern district of Louisiana.

ARGUMENT.

I.

The first assignment of error complains of the rejection by the trial judge of a certain paper writing offered in evidence by the petitioner (record, pp. 13 and 14), being a resolution of the board of commissioners for the Buras levee district, at a meeting held in Buras, La., on Saturday, November 20, 1897, wherein it was by resolution attempted to ratify and adopt the action of the petitioner in damming said Red Pass and to confirm said action as the action of the board of commissioners of the Buras levee district. The court below refused to admit this paper writing in evidence, upon the ground of immateriality and irrelevancy, and it is submitted that the action of the trial court was clearly correct—first, because the board of commissioners for the Buras levee district had no more authority to close the pass than did the petitioner, and second, because the resolution was not adopted until November 20, 1897, long after the closing of Red Pass and after the indictment was found against the petitioner, said Red Pass having been dammed on November 16, 1895, and the indictment having been presented on May 19, 1897. (See record, p. 31 and p. 2.) Clearly, therefore, this ex post facto resolution could have no effect as an authorization by the board of commissioners for the Buras levee district to the petitioner to erect the dam complained of.

Besides, it is well settled that a party complaining of the rejection of evidence must show that if the evidence had been admitted it would probably have produced a

different result on the trial. (*Packett Company* v. *Clough*, 20 Wall., 528.) In this case, if the resolution of this board of commissioners had been received in evidence, it could not possibly have produced any different result in the verdict of the jury or in the judgment of the court, for the plain reason that the board of commissioners had no more authority to dam this stream without the consent of the Secretary of War than did the petitioner in his personal capacity, as will more fully appear in the consideration of the subsequent assignments of error.

II.

The second assignment of error complains that the court refused to instruct the jury to acquit the defendant upon the whole evidence.

The indictment charges the petitioner with having dammed a navigable stream of the United States without the consent of the Secretary of War, as required by the act of September 19, 1890, as amended by the act of July 13, 1892. The fact that the petitioner did erect the dam across Red Pass, in manner and form as complained of, is admitted. The only question is as to the navigability of this stream. This is a mixed question of law and of fact, and the charge of the trial judge properly left the determination of the element of fact to the jury. The jury were instructed (pp. 112, 114, 115) that—

> The main, if not the only, question for you to decide is, whether Red Pass was a navigable stream of the United States. I will say to you at the outset, that you are the sole judges of the facts and of

the credibility of the witnesses. I am the sole judge of the law; you must take the law as I give it to you. I have a right to review the facts, and even to express an opinion upon them, but I say to you very distinctly that if I do so, any expression of opinion of mine, on any matter of fact, is in no manner binding upon you.

* * * * *

Now then, as I said to you at the outset, the only question for you to decide is—under the admission that Robert S. Leovy dammed the pass, and assuming that you will agree with me that there is not sufficient evidence to convict Mr. Augustus F. Leovy—I say to you that the sole question for you to decide is whether Red Pass, at the time Mr. Robert S. Leovy dammed it, was a navigable water of the United States.

What is a navigable water of the United States? It is a navigable water, which, either of itself, or by connection with other waters, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State, from the State in which you start upon your journey, then that is a navigable water of the United States. It is so called, in contradistinction to waters which rise and come to an end within the borders of a State. Suppose you had two lakes within the State, with a little river connecting these two lakes, both of the two lakes and the little river being within the confines of one and the same State, these waters would not be navigable waters of the United States, whether they were navigable or not, for the reason that you could not, from any point on these waters, travel continuously by water to another State of the

Union. But if from the water in one State (as I said before, and repeat, because it is important) you can travel by water continuously to another State and the water is a navigable water, then it is a navigable stream of the United States.

Now, then, what is a navigable river? A navigable river is a river which is navigable in fact, a river which affords a channel for useful commerce. One of the witnesses for the defendants stated to you his idea of a navigable stream to be a stream that permitted large steam vessels to navigate. This is not the idea of the law. If the stream will bear any vessel which is used in ordinary commerce then it is a navigable stream. Therefore, the question is, Was Red Pass navigable? Was it a navigable water of the United States? If it was navigable, and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. And in this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways: By connecting with waters of the Gulf if you should find it connected that way, or by connecting with the water of the Mississippi. I mean to say that if there is evidence here that you could leave the Mississippi River and go into the Jump and then go to the place where this dam was built by Mr. Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi and from the Mississippi you could go to other States of the Union.

* * * * *

All these things you are to take into consideration. You have the testimony, as I remember, of men

> who say they have gone through there. If Tonfine Pass and Red Pass are available for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find that it connected with other waters over which a continuous journey could be made to other States, then it would be a navigable water of the United States.

This charge, as will more specifically appear in the consideration of other assignments of error, is a perfectly sound enunciation of the law on the subject with which it deals. Upon the evidence, the jury was left to determine whether the pass was in fact navigable. Under this charge, of course, the petitioner could not have been convicted, unless the jury found that the pass was navigable in fact; and the decision of the jury upon this point can not be overturned by an appellate court, if there was any competent evidence whatever before the jury upon which they might have reached such a conclusion. Where there is some evidence tending to establish a fact in issue, the jury must be the sole judges of its sufficiency. (*Richardson* v. *Boston*, 19 How., 263; *Insurance Company* v. *Snyder*, 93 U. S., 393.)

The appellate court can only look at the evidence to determine its competency. If competent, the fact found by the jury, and all inferences deducible from that fact are binding upon the appellate court. (*Hepburn* v. *DuBois*, 12 Pet., 345–375; *Damberger* v. *Schoolfield*, 160 U. S., 149; *Manufacturing Company* v. *Brill*, 7 U. S. App., 601.)

The testimony of twelve witnesses was presented to the jury on behalf of the prosecution to establish the fact

that said pass was navigable and that from said pass a continuous trip could be made to the Mississippi River and into the Gulf of Mexico; and the testimony of these witnesses further established the fact that said pass was used by a great number of persons for the purpose of conveying oysters and other merchantable produce through it to the markets, and that the same was navigable for oyster boats and luggers engaged in said trade, and that in its ordinary stages said pass contained from $2\frac{1}{2}$ to $4\frac{1}{2}$ feet of water.

William O'Brien (Record, p. 16) testifies that at the point on Red Pass where this dam was erected, said stream was about 150 feet wide and contained $4\frac{1}{2}$ feet of water.

Patrick Galligan (Record, p. 20) testifies to having used this pass in his boat going all the way down from the Jump engaged in selling potatoes, vegetables, and beef.

R. M. White testifies that he has known the pass since 1875; that he has frequently been over it and taken out willows on barges drawing from 4 to 5 feet of water by the tugboat, and that he has frequently seen luggers go through the pass down into the Gulf of Mexico.

John Collen (Record, p. 25) testifies to having used this pass in the navigation of his 35-barrel oyster boat, which drew about $2\frac{1}{2}$ feet of water, and on page 26 he says:

> I go through the Jump where Mr. Leovy closed into the Mississippi River. I get into Cubitt's Gap from there, and go round this side back of the quarantine to get my oysters; and when I came back I came through where Mr. Leovy closed.

On page 27 he testifies that he went all the way to the Gulf by going through this stream. He says that the pass contains from 10 to 12 feet of water on the straight, and in the bends from 5 to 6 feet. When asked what was the depth all the way through to the Gulf, he answers, from 5 to 10 or 15 feet; that is, all the way to the Gulf; but then there is a bar at the outer end of the pass, and of course when you come there you only find 2½ or 3 feet; then if you stay there a couple of hours the tide will rise, and you can find from 3 to 4 feet of water. He testifies that he has known many other people going through that stream with their boats, and names them; that he has seen them there, and knows of his own knowledge that they used this stream with their luggers and boats—luggers holding from 125 to 150 barrels of oysters. On page 28 he testifies that there would be from 25 to 30 boats passing through there every day, having a good channel and a good place to pass through.

Marco Benditich (Record, pp. 29 and 30) testifies that he has been through this pass with a lot of lumber; that he went through Red Pass and Tonfine Pass and got to sea with his load of lumber; that he went through Red Pass and then through Tonfine Pass to the Gulf of Mexico; that he was drawing about 3½ feet of water; that he has also been through the same route with oysters, and that his boat was a 6-ton boat.

Marco N. Benditich (Record, pp. 31 and 32) testifies that he has been through this pass to the Gulf of Mexico; that he went through Red Pass into the Mississippi; then down the river 3 or 4 miles to the new quarantine,

and from thence into the Gulf; that his boat when he went through there was drawing 3½ feet of water.

Luke Scovell (Record, pp. 35 and 36) testifies that he has been through this pass in a lugger of little over 7 tons; that he went through there every year; that he has been going throught here for fifteen years; that he went down into the Jump and into Red Pass.

Michael Fanitivitch (Record, pp. 36 and 37) testifies that he was engaged in the oyster business. He has been through this pass every year in boats carrying 125 barrels of oysters and which drew 4 feet of water; that he has frequently been through the pass as high as five and six times during the winter—sometimes ten times; that he would go down the river sometimes and would pass through Red Pass, and at the branch of Tonfine go out into the sea.

Bozo Bogetto (Record, pp. 37 and 38) testifies that he is engaged in the oyster and lumber business, and has been so engaged from 1881; that he used this pass from 1881 to 1893; that his boats hold from 100 to 110 barrels of oysters, drawing at from 3 to 3½ feet of water. He brought oysters and lumber from the east.

Peter Stevelovich (Record, pp. 39 and 40) testifies that he used this pass in the oyster business; that his boat drew 4 feet of water.

Steffano Rusich (Record, pp. 41 and 42) testifies that he passed through Red Pass and Tonfine Pass with oyster boats and has been doing so for some seventeen years; that his boats carry about 120 barrels of oysters, and drew from 3 to 3½ feet of water.

There was some evidence offered by the petitioner in

rebuttal, but we need not pause to consider it. The jury was the sole judge of the sufficiency of the evidence to establish the fact of the navigability of this stream, and having so found upon the competent evidence, it follows, the damming of the stream being admitted, that the petitioner is proven to have done the act complained of in the indictment. That the petitioner, therefore, is guilty of the act complained of in the indictment is a fact established by competent evidence and found by the jury and is not now subject to animadversion.

Whether the act complained of in the indictment was an unlawful act will appear from the consideration of subsequent assignments of error.

III.

The third and eighth assignments of error are best considered together. They complain of the refusal of the court to give the instruction requested by the petitioner, as set out in said third assignment of error (record, p. 126), and of that portion of the general charge set out in the eighth assignment of error (record, pp. 127, 128). The effort here made is to draw a distinction between what counsel terms a "natural stream" and a stream made by a crevasse; and the argument is made that "the act under which the defendant was indicted, in referring to 'navigable waters of the United States,' clearly relates to natural and permanent streams and not to those caused by the breaking of river banks and levees." Does counsel mean to assert that this pass is not a "natural" stream? According to their own evidence, it is a stream which

came into existence about the year 1836 by the Mississippi River seeking an outlet near its mouth by natural forces, resulting in the creation of the stream in question by operation of nature, without any artificial assistance. It is certainly not an unnatural nor an artificial stream, and it must, therefore, be a natural one.

Again, does counsel mean to assert that this is not a "permanent" stream? According to their own evidence it was created some time about 1836 and has been in existence ever since. It strikes us that a stream which has existed for nearly three-quarters of a century is about as permanent as a thing can well be. The origin of Red Pass is entirely irrelevant to the issue. It is immaterial whether nearly three-fourths of a century ago the pass was formed by the Mississippi River breaking its banks and the formation of a new channel for its outlet to the Gulf. If it is in fact navigable—navigable by Durham boats, oyster boats, flatboats, or any usual or ordinary method of travel or vehicle of commerce, then it is a navigable river; and if by itself, or through its connection with other rivers, lakes, or bodies of water whatsoever, a continuous passage may be made through it, in its ordinary stages, to another State, or to a foreign country, then it is a navigable water of the United States, and over which the Federal Government is given paramount and exclusive jurisdiction and control by the Constitution, even though such river be situated wholly within the confines of a single State. The only questions to be decided, therefore, are, first, is Red Pass navigable in fact, under ordinary conditions and by ordinary means; and, second, can a passage be

made through it and its connections to another State or to a foreign country? Both these questions of fact were properly left by the court to the determination of the jury, as witness the charge of the trial judge, heretofore quoted under division I of this brief, and which is to be found on page 116 of the record. The law, which results from an ascertainment of the fact that Red Pass and its connections were navigable in fact, and that through them a continuous journey could be made in their ordinary stages to another State and to a foreign country, was clearly and correctly stated in the charge of the trial judge, as cited ante.

The different meanings of the word "navigable" as employed in legal phraseology are thus defined by Gray, C. J., in *Commonwealth* v. *Vincent* (108 Mass., 441–447):

> The term "navigable waters," as commonly used in the law, has three distinct meanings: First, as synonymous with "tide waters," being waters whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or second, as limited to tide waters which are capable of being navigated for some useful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.

In this country the word "navigable" is not employed in the technical or English sense of that expression, and a water is "navigable" if it be navigable in fact, without any reference to the action or influence of the tide. In the case of *Daniel Ball* (10 Wall., 557–563) Mr. Justice Field, for the court, said:

> The doctrine of the common law as to the navigability of waters has no application in this country.

> Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels which are not even affected by the tide at any point during their entire length. A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In the case of the *Montello* (20 Wall., 431–441) Mr. Justice Davis for the court said:

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and the manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or

> highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of the river.

In the case of *Escanaba* v. *Chicago* (107 U. S., 678–682) the above doctrines are quoted with approval by the court, where it is held that the power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, when by themselves, or their connections with other waters, they form a continuous channel of commerce among the States or with foreign countries.

In the case of the *Water Power Company* v. *The Water Commissioners* (168 U. S., 349–359) this court, speaking through Mr. Justice Peckham, said:

> In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream.

Red Pass being, then, navigable in fact, in its ordinary stages and by ordinary means, it is a navigable river, and the only remaining question is whether it is a navigable water of the United States. The jury found, and the evidence clearly establishes the fact, that a continuous journey may be made through Red Pass and its connections, in their ordinary stages, by the ordinary means, into the Mississippi River, and thence northward to various States, or southward into the Gulf of Mexico,

and also direct to sea without entering the Mississippi River. (See Record, p. 27, top; p. 29, middle; p. 31, bottom; pp. 36, 37, 38, 40, 57, and 61.) These facts unquestionably make Red Pass a navigable water of the United States.

In the case of the *Daniel Ball* (10 Wall., 557–563) the court, through Mr. Justice Field, after laying it down that rivers are navigable in law which are navigable in fact, continues—

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.

(See in accord *The Montello* (11 Wall, 411), where the same doctrine is announced by the court through the same learned jurist.

In the case of *The Montello* (11 Wall., 430) it was decided that the navigability of a stream for the purpose of bringing it within the terms "navigable waters of the United States" does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or Durham boats, nor upon the difficulties attending navigation, such as those made by falls, rapids, and sand bars, even though these be so great that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce; but, on the contrary, the test depends upon whether the river in

its natural state is such that it affords a channel for useful commerce by affording transit in itself, or through its connections, to another State or to a foreign country.

In the case of *Escanaba County* v. *Chicago* (107 U. S., 678–682) this court, through Mr. Justice Field, said:

> The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when, by themselves or through their connections with other waters, they form a continuous channel for commerce among the States or with foreign countries.

Citing with approval the case of the *Daniel Ball* (10 Wall., 557).

In *Harmon* v. *The City of Chicago* (147 U. S., 396) the question arose upon the power of the city of Chicago to impose a license tax for the privilege of navigating the Chicago River by steam tugs which had been licensed by the United States, and it was held, in the language of the court, at page 412, that—

> Waters navigable in themselves in a State and connecting with other navigable waters so as to form a waterway to other States or foreign nations can not be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by the Congress.

The latest decision of this court upon this subject is to be found in the case of the *United States* v. *The Bellingham Bay Boom Company*, No. 21 of the present term, decided January 29, 1900. This was a case arising under the act of September 19, 1890, and was instituted by the

Attorney-General filing a bill to enjoin the defendant from further continuing a certain boom which it had constructed across the Nooksack River in the State of Washington, and to obtain the removal of the same as an obstruction to the navigation of that river. In the statement of the case, the court, through Mr. Justice Peckham, says:

> On the trial it appeared that the Nooksack River is a navigable stream, having its source in Whatcom County, State of Washington, and runs through Whatcom County to Bellingham Bay, emptying into that bay, and thence into the Pacific Ocean. The waters of the river lie wholly in Whatcom County, and are navigable from its mouth for a distance of several miles toward its source by light water craft. The boom in question, built by the defendant company at a point just above where the river empties into the bay, is frequently an obstruction to the navigation of the river by steamboats and other craft, as the boom crosses the channel of the river and entirely fills it, excepting that there is what is termed a "trip," which may be opened and vessels pass through the same on their way up and down the river.

This water was held to be a navigable water of the United States, and the boom erected by the defendant company held to be an obstruction of it, which could be abated and removed under the provisions of section 10 of said act of September 19, 1890.

IV.

The fourth, seventh, and ninth assignments of error complain of the refusal of the court to grant the special

instructions requested by the petitioner, which are set out in said assignments of error number four and seven (Record, p. 127), and of that portion of the general charge which is set out in the said ninth assignment of error (Record, p. 128). The object of these assignments of error is to present to the consideration of the court the question whether he State could authorize the closing of this navigable stream in the exercise of its "police power." But under the evidence in this case it is submitted that no such question legitimately arises. As was said by the circuit court of appeals (pp. 140–141):

> There is no evidence in the record tending to show that the police jury of the parish of Plaquemine ordered Red Pass closed for the purpose of "affecting or protecting the peace, morals, education, health, or good order of the people." But the case does show that the pass was ordered closed, and was closed, for the sole purpose of reclaiming swamp land. Under the power to regulate commerce, Congress having forbidden the closing of any navigable water without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits of the State, can be closed, under the exercise of the police power of the State, for any purpose whatever; but where the purpose only is the reclamation of swamp lands there is no doubt the police power of the State must give way to the authority of Congress.

Not only is this true, but the State of Louisiana did not order the erection of this dam at all. There was no legislative enactment or other State authority by which the closing of this pass was ordered. The very most

that is claimed for State authority in the premises is the action of the board of commissioners for the Buras Levee district, but it is submitted that the evidence in this case does not even establish the contention that this board of commissioners ordered the pass closed as an agent or instrumentality of the State, but that, on the contrary, the pass was closed by private individuals for their own private and personal gain in the improvement of their farm lands in the adjacent territory, and, that any claim of authority or direction, either from the State or from any agent or instrumentality of the State, is a mere flimsy pretext, without the slightest foundation in fact. The contention of the court is earnestly invited to pages 84 and 85 of the record, and in connection therewith, to pages 80, 81, 82, and 83. The testimony here referred to is that of George Schomberger, who is the president of this Buras police board, under whose authorization and direction it was claimed that the dam in question was erected. On page 80, in a colloquy between the trial court and counsel for the petitioner, there occurs the following:

> The COURT. Yes, but I want it clearly presented that this Red Pass was not closed by the State of Louisiana.
>
> Mr. LEOVY. We have stated over and over again that the police jury ordered Red Pass to be closed, and appointed a levee syndic to do it; therefore the State did it, through its organized instrumentality, the police jury.

But the witness's testimony, as will now be shown, does not bear out this assertion of his counsel. On page 81

the witness testifies that there was a petition presented to the police jury by a number of property holders to have this pass closed, and on page 83 he testifies that there was no opposition to closing the pass, except by the fishermen; that there had been considerable improvements made in this vicinity and a number of valuable orange orchards were in existence there. On page 84 it is shown that this petition was really brought into existence in 1890, whereas the pass was not closed until 1895, and he testifies that Mr. Leovy, the petitioner, and his father, having large interests in a plantation in this vicinity, presented the resolution authorizing the closing of this pass, and it was understood that whoever should close it should close it at his own risk and at his own expense. On page 85 it is testified that Mr. Leovy paid for the expense of closing this pass personally out of his own private means and that the police jury did not pay for it, and that the witness is positive upon this point. This fact is shown by the resolution itself (Record, p. 118), wherein it is recited that the closing of the pass shall be at the expense of the persons favorable to it and not at the expense of the board of commissioners or of the State. Even in the so-called resolution of ratification (Record, p. 119) there is no pretense of direction on the part of the board of commissioners, but merely the giving of their assent to the closing of the pass at the expense of the person closing it, and the court will observe that the resolution referred to as an authorization for the closing of the pass was had on July 1, 1890, whereas the pass was not closed until November 16, 1895.

The court's attention is further directed to the evidence at pages 49, 54, 75, 76, and 79, all of which is evidence introduced by the petitioner in his defense, and which shows conclusively that the only reason ever assigned for a desire on anyone's part to have this pass closed was the improvement of the orange orchards and agricultural lands in that vicinity, without the slightest pretense that it was necessary for the safety, or health, or well-being of the inhabitants of that portion of the State. No witnesses were introduced to show that the damming of the pass was necessary to insure the health, or the morals, or the safety of the people; no testimony is introduced to show that the existence of this stream created vast "malarial marshes," as dilated upon in counsel's brief, and there is not a line of evidence in the record to show that the pass was ordered closed, or desired to be closed for any other reason than the improvement of private property.

We submit, therefore, that there was no exercise of police power by the State in this matter, nor the necessity for the exercise of any such power. It was closed by private individuals for the pecuniary advantage of the owners of the land in that vicinity; and the argument of counsel concerning the police power of the State is really the argument of an imaginary case, entirely *dehors* the record. This court is not called upon to pass upon any such question. The only question before the court is whether private persons, for their own aggrandizement, for their own private profit, at their own private expense, albeit under the flimsy pretense of the authority of the police jury of a parish of a State, can

dam up a navigable river of the United States in order to improve their farm lands. The answer is plain. The latest decision of this court on this subject is to be found in the case of the *United States* v. *The Bellingham Bay Boom Company*, being No. 21 of the present term, decided January 29, 1900. In that case Mr. Justice Peckham, speaking for the full court, said:

> The power of Congress to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein can not be questioned. When Congress chooses to act, it is not concluded by anything that the States or that individuals by their authority or acquiescence have done from assuming entire control of the matter and abating any obstructions that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. Citing *Willamette Iron Bridge Company* v. *Hatch* (125 U. S., 1) and the numerous authorities collected in that opinion.

In the case of *Henderson* v. *The Mayor of New York* (92 U. S., 259–271), where the contention was made that a State in the exercise of its police power might impose a certain regulation upon the landing of emigrants at the port of New York, this court, through Mr. Justice Miller, said:

> This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may

be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. * * * It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But however difficult this may be, it is clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied to powers conceded to belong to the States.

In the case of *The New Orleans Gaslight Company* v. *The Louisiana Light Company* (115 U. S., 650, at pp. 661–662), the full court, through Mr. Justice Harlan, quotes with approval the language of the opinion and the decision of the court in *Henderson* v. *The Mayor of New York* (*supra*), and reiterates the doctrine that "No definition of the police power and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In the case of *Morgan* v. *Louisiana* (118 U. S., 455–464), the court, through Mr. Justice Miller, said:

> We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own and therefore not ceded to Congress. For while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations and an exercise of the police power, it has been said more than once in this court that even where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail. Citing the cases referred to *supra*.

See, to the same effect, *Schollenberger* v. *Pennsylvania* (171 U. S., 1).

The authorities relied upon by the petitioner do not in any wise militate against this position. In the case of *Railroad Company* v. *Husen* (95 U. S., 465) the statute in question, which was a statute of the State of Missouri, prohibiting the driving or conveying of any Texas, Mexican, or Indian cattle into the State within certain dates, was held to be unconstitutional, as an attempt to regulate commerce, and the decision of the court and the language of the opinion clearly established the correctness of the doctrines above announced. At pages 471–472, Mr. Justice Strong, for the court, said:

> But whatever may be the nature and reach of the police power of a State, it can not be exercised over a subject confided exclusively to Congress by the Federal Constitution. It can not invade the domain

of the National Government. It was said in *Henderson et al.* v. *Mayor of the City of New York et al.* (*supra*), to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied it may be to powers conceded to belong to the States."

The case of *Lawton* v. *Steele* (152 U. S., 133) was a fishery case, involving the right of the State of New York to pass a law to preserve from extinction fisheries in the lake waters within its jurisdiction by prohibiting exhaustive methods of fishing or the use of destructive instruments. This is a case which involved the common-law right of fisheries and did not draw in question any conflict between the action of the State and a Congressional enactment. The right of the State to pass laws for the protection of fish and game within its borders is, of course, conceded; the regulations were not regulations which denied the common right of fishing, but were only regulations to prevent the improper use of the privilege and the destruction of the article. By reference to pages 137, 138, and 139 of the opinion in this case, it will be observed that the doctrines above announced are distinctly reaffirmed and adhered to, and the cases above cited referred to with approval. The common-law right of fishery is entirely distinct and separate from the right of navigation, and may or may not exist in the same waters at the same time.

In Gould on Waters (2d edition, section 54) it is said:

> Nature is competent, it has been said, to make a navigable river without the aid of the legislature; and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact. This right of navigation is distinct from the public right of fishery, which may or may not exist in the same waters.

See also *Leconfield* v. *Lonsdale*, L. R., 6, C. P., 665; *People* v. *Platt*, 17th Johns., 195–211.

The case of *Barbier* v. *Connoly* (113 U. S., 27), which is cited by counsel as being an adjudication that it is the exercise of lawful police regulation to drain a sea marsh, falls very short of being an authority for such contention. The case decides that a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits, from 10 o'clock at night to 6 in the morning, is purely a police regulation, competent to be enacted as an ordinance by a municipality possessed of the ordinary powers, and the case decides nothing more. It is an authority for the validity of such a municipal ordinance and nothing else. The only portion of the opinion that in the slightest degree refers to sea marshes is the dicta which is contained on page 31, as follows: After deciding that the fourteenth amendment did not take away the police power of a State, it is said that, "from the very necessities of society, legislation of a special

character having these objects in view must often be had in certain districts, such as for draining marshes and irrigating arid plains." The opinion in this case was written by Mr. Justice Field, who was also the author of the opinions in several of the cases cited above, in which it was held that a State could not interfere with the navigation of any navigable water of the United States, whether under the pretense of police power or not, and it certainly is not to be supposed that these few words of dicta in this case were intended to cast any doubt upon his previous opinions, especially in view of the fact that no such consideration was before the court, and that the words were merely used as examples of the police power. On the contrary, it is quite plain that the example of the power of a State under its police power to drain sea marshes and irrigate arid plains would be only when those things could be done without interfering with any enactment of Congress over a navigable stream, or any other subject within the jurisdiction of the Congress.

The case of *Withers* v. *Buckley* (20 How., 84), so confidently relied upon by the petitioner, is not in anywise an authority for any contention made in the brief. That is a case in which the court was called upon to determine whether or not a statute of the State of Mississippi for improving the navigation of a river which empties itself into the Mississippi was in conflict with the act of Congress providing for the admission of that State into the Union, which said act guaranteed the free navigation of the Mississippi River. The only question to be determined was whether or not the act of the State operating upon Old River would result in impairing the navigation

of the Mississippi, and the court held that the act of the State did not in anywise relate to the Mississippi River, and that inasmuch as there was to be no effect upon the Mississippi River by the act in question, that the provisions of the act of Congress were not in anywise interfered with, and the act of the State, therefore, lawful. It was also determined as a matter of fact that Old River was not a river which emptied into the Mississippi, and that it was not a navigable stream, the court saying (p. 93):

> With no propriety of language, then, can it be pretended that the contemplated communication between the Homochitto and the Buffalo Bayou would be the violation of a law which declares that the waters of the Mississippi, and the navigable rivers and waters leading into the same, shall be common highways and forever free as well to the inhabitants of the State as to the other citizens of the United States. Old River was once the bed or a portion of the Mississippi, but never a separate navigable river flowing into the Mississippi. Any improvement, therefore, in the facilities of reaching the Mississippi by another river can not be an obstruction in what never was, in any correct sense of the phrase, a navigable river leading or flowing into the Mississippi.

There was not, at the time of the decision in that case, any act of Congress on the general subject of navigable streams, and forbidding them from being obstructed without the consent of the Federal Government, and, therefore, even if the decision could otherwise be regarded as favorable to the contention here, it would only fall within that class of cases which hold that the States may

legislate upon subjects over which the Federal Government has control in the absence of any Federal legislation to the contrary, but that as soon as the Federal Government assumes control over the matter, the Federal act supersedes the State act and nothing done under its authority can be permitted to impede the navigation of the river contrary to such Federal statute. (See Cooley's Const. Lim., 6th ed., p. 722.)

On this branch of the case it is therefore submitted, first, that the State has not dammed this river at all in the exercise of its police power, or any other pretended power, and that it has not done so either by legislative enactment or by authorization of any agent or officer for that purpose, but that, on the contrary, the said dam was erected at the solicitation of private individuals, at their private expense and risk and for their personal aggrandizement; and, second, that even if said dam had been erected directly by the State, under a legislative enactment for that purpose, the act would not, in any proper sense, have been the exercise of the police power by said State, and the legislative authorization to close this navigable water of the United States would have been void and of no effect.

V.

Assignments of error numbers six and ten complain of the refusal of the trial court to instruct the jury as specially requested; that if Red Pass, when closed, was not substantially useful for some purpose of interstate commerce, Federal legislation upon the subject was beyond the power of Congress and void. It is submitted that

substantially the same thing was enumerated in the general charge of the trial judge, and that no possible detriment could have resulted to the petitioner from the failure to give the specific charge here requested. Under assignment of error number ten the contention is made that inasmuch as Red Pass was essentially a stream wholly within the confines of the State of Louisiana it was not one over which the Federal Congress had any jurisdiction. It has already been fully shown that this navigable stream connected with other streams, by means of which a continuous passage could be made to the Mississippi River, and also into the Gulf of Mexico. It follows, therefore, that there is no merit in this contention, and the request was properly refused. And so it is immaterial as to what amount of commerce was being carried on by means of this pass. It is sufficient under the authorities already considered that the pass was in fact or was susceptible of being made a channel for useful commerce. (See Division III of this brief and authorities there collected.)

VI.

By the eleventh assignment of error it is contended that no penalty is imposed by any statute of the United States for the offense of which the petitioner was convicted, because it is argued that the act of July 13, 1892, repealed section 7 of the act of September 19, 1890.

By the act of September 19, 1890 (26 Stats., 454), it is provided:

> That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulk-

head, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

The tenth section of the same act provided as follows:

Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall

violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

In the rivers and harbors act of 1892 (27 Stat. L., ch. 158, pp. 88, 110), section 7 of the act of 1890 was amended and reenacted so as to read as follows:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States under any act of the legislative assembly of any State until the location and plan of such bridge or other works have

been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of a breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

Provided, That this section shall not apply to any bridge, bridge draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers, and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State.

In the case of *Frost* v. *Wenie* (157 U. S., 46, 58) this court, through Mr. Justice Field, said:

> It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject unless the last statute is so broad in its terms and is so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore to displace the prior statute.

This language is quoted and applied with approval in the case of *Healy* v. *The United States* (160 U. S., at p. 147) and is in accord with the universal doctrine of this

court. (See *United States* v. *Tyncne*, 11 Wall., 88, 93; *Redrock* v. *Henry*, 106 U. S., 596, 601; *Henderson's Tobacco*, 11 Wall., 652; *King* v. *Cornell*, 106 U. S., 395, 396.)

It is submitted, therefore, that the amendment relates only to altering ports, harbors, etc., and otherwise the reenacted section is the same as the original. The intention and effect of the legislation of 1892 was to embody in the act of 1890 the amended and reenacted sections so that the provisions of section 10 of the act of 1890 should apply to the violation of the amended and reenacted section the same as to the violation of section 7 as originally enacted.

Black on the Interpretation of Laws, pp. 356, 357.

In the *addendum* to the brief of counsel for the petitioner reference is made to the act of March 3, 1899 (30 Stats., 1151), as "changing" the policy of Congress upon the subject of regulating obstructions on navigable streams of the United States, and certain "inferences" against the former act are drawn from this alleged "change of policy." It is submitted that there has not been any change of policy on the subject, and that it is as equally necessary to procure the "authorization" or "permission" of the Secretary of War to erect any dam or structure over or upon a navigable water of the United States under the act of 1899 as it was under the act of 1890 or the amendment of 1892. A bare perusal of the act of March 3, 1899 (30 Stats., 1151), proves this. That act is as follows:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress to the navi-

gable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or, where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

VII.

CONCLUSION.

In the brief filed by the learned counsel for the petitioners in the circuit court of appeals an imaginative picture of unparalleled evils and misfortunes is drawn, which, it is contended, will be the result of the conviction of the petitioner under this indictment. In answer to this enumerated list of possible calamities the court of appeals (Record, p. 147) said:

> We notice this merely to say that if the picture of evils resulting from maintaining the statute of the United States forbidding the closing of navigable waters is correctly drawn the remedy lies in

Congressional rather than in judicial legislation. It does not appear to us, however, that the enforcement of the Federal statute ought to have any such disastrous and humiliating effects. It is not to be supposed that the Secretary of War will refuse his approval to any reasonable closing of swamp outlets and bayous wholly within or partly within a State whenever the same is necessary, or apparently necessary, to protect the health, morals, or general good of the community interested. It is probable that all that will be necessary will be to apply, showing the apparent need of the work proposed; and such application to the Government controlling the navigable waters of the United States may well be made, and without compromise of dignity by any State officer or board, or even by the State itself.

This, it would seem, is a complete answer to the imaginary evils which the learned counsel have conjured up; but if it is not, it may be further answered in the language of Mr. Justice Harlan, denying an application for rehearing in the case of *American County* v. *Allen* (103 U. S., at p. 515)—

> If, as urged, the result is unfortunate for the county, we can only say, what can not be too often repeated, that hard cases can not be permitted to make bad law.

It is therefore submitted that there was no error committed in the trial and that the judgment of the circuit court for the eastern district of Louisiana should be affirmed.

GEORGE HINES GORMAN,
Special Attorney.

O